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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1976

No. .....

ANTHONY DE LUTRO,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Anthony DeLutro, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered September 7, 1976, affirming the judgment of the United States District Court in the Southern District of New York convicting the defendant after trial (Irving Ben Cooper, USDJ, and a jury) of the crimes of Conspiracy and Distributing and Possessing with Intent to Distribute a Narcotic Drug in violation of Title 21 of the United States Code. On December 3, 1975, the petitioner was sentenced to concurrent terms of twenty-five years in prison with a specified period of six years on parole to follow. He is at present in confinement pursuant to that judgment.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced in the Appendix hereto.

JURISDICTION

This petition has been filed within 30 days of the entry of the order of affirmance in the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was there a variance between the single inclusive conspiracy alleged in the indictment and the multiple conspiracies revealed by the proof and, if so, did such error prejudice the petitioner who had, at worst, an isolated transaction with one of the core conspirators?

2. Did the trial court's charge fail to provide adequate instruction to the jury on the delineation of a unitary conspiracy, or guidance for determining whether the petitioner's conduct brought him within that single criminal enterprise?

3. Was the petitioner's right to a fair trial denied by (a) the court's charge to the jury relating to credibility, (b) the prosecutor's withholding materials helpful to the defense in violation of 18 U.S.C. §3500, and (c) the admission into evidence of cash taken from a co-defendant after the termination of the conspiracy and unconnected to the alleged substantive transactions?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of 21 United States Code follow:

§841. Prohibited acts A.

(a) Unlawful acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

(b) Penalties.

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment

and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

§*846. Attempt and conspiracy.*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Pub. L. 91-513, title II, §406, Oct. 27, 1970, 84 Stat. 1265.)

STATEMENT OF THE CASE

Sometime during 1973, three men of extremely low and vicious character met and formed a partnership for the illegal distribution of narcotic drugs. Two of them, Perna and Verzino, were the Government's star witnesses. They testified to numerous and diverse transactions with a number of different suppliers and customers over a period of about one year. Among these transactions, Verzino recounted a single transfer of five kilos of pure heroin which he said he purchased from the petitioner for $200,000.

In his defense, the petitioner testified and denied any part in the transaction alleged. He also told of an incident in which Verzino had confronted him in a restaurant and accused him of having had sexual relations with Verzino's wife. At the petitioner's denial, Verzino made an indefinite threat of reprisal. Several customers in the restaurant testified to their recollection of the altercation. A prisoner-"lawyer" testified that he had been consulted in prison on a legal question by Verzino who had told him that he planned to frame DeLutro on a narcotics case because DeLutro had been sexually intimate with Verzino's wife.

REASONS FOR GRANTING THE WRIT

1. The prosecution proof suffered the error of variance from the pleading, to the demonstrable and severe prejudice of the petitioner.

The trial record reveals no proof to sustain the prosecution theory that the activities of the petitioner constituted a part of a single overall conspiracy. This variance from the pleadings constituted a fatal error when viewed in the light of the incalculable but substantial prejudice to the defendant who required a dispassionate jury appraisal of his defense of denial.

According to the testimony of one of the Government witnesses, marginally confirmed by the other, DeLutro on a single occasion transferred to the witness a substantial quantity of heroin, distinguished by its high concentration from most of the drugs otherwise bought by these partners. The specific unit of heroin which the witnesses said they purchased from DeLutro was never traced to subsequent purchasers to connect DeLutro with any such later sales "agreements." And not the frailest filament linked DeLutro to other unrelated acquisitions by the witnesses from other defendants claimed to be suppliers. Moreover, the isolated transaction with DeLutro was not reflected in the partners' "business records" for whatever that evidence might be worth as proof of a unitary venture. Nor did the transaction with DeLutro resemble the credit-and-reorder character of the witnesses' customary business; the deal with DeLutro was, according to the Government testimony, a single sale for cash "up front".

From this record, no "mutual dependence and assistance" can be reasonably inferred between DeLutro

and the other defendants orbiting around the Government witnesses (*United States v. Tramunti*, 513 F.2d 1087 (2d Cir. 1975); *United States v. Bertolotti*, 529 F.2d 149 (2d Cir., 1975)). The aims and purposes of DeLutro and the others were not "common" (*United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962); *United States v. Bertolotti, supra*), but parallel. The only common factor between the DeLutro transaction and the activities of the others was the participation of the same Government witnesses. And as this Court stated in *United States v. Kotteakos*, 328 U.S. 750, at 773 (1946), a nexus of this sort is insufficient to unite conspiracies, though they are "related in kind."

Yet, despite this manifest variance between pleading and proof, DeLutro had to sit with seven other defendants through five week of trial while scores of transactions were described, as highly inflammatory evidence unrelated to his case was displayed to the jury, as the Government witnesses' accounts of their relations with other defendants were seemingly confirmed by their own coded records, and finally have his case submitted to the jury on instructions allowing them to convict him of conspiracy upon the evidence of others' guilt.

Since this Court (*United States v. Kotteakos, supra*) has regarded numbers as important in the assessment of harm, we add that DeLutro was indicted with nineteen co-defendants along with six additional named but unindicted co-conspirators. The first count charging conspiracy recited twenty-four overt acts, two of which referred to DeLutro. In addition to the conspiracy charge, the indictment contained sixteen substantive counts, only one of which accused DeLutro. We shall not attempt to tally or recapitulate the many events and transactions described in testimony under these multiple charges, nor try to parse the record for distinct conspiracies. Suffice it to say that thousands of pages of proof detailed the activities of the Government witnesses with defendants other than

DeLutro, and the agreement ascribed to DeLutro remained unrelated to all the other operations of the witnesses, however their legal number may be computed.

The "spill-over" of proof against the co-defendants is likely to have had serious prejudicial effect on the substantive charge as well. Taken alone—as it would have been had he been separately tried—the persuasiveness of the inculpatory evidence is in considerable doubt. DeLutro's own testimony and the independent evidence he adduced sharply contradict the Government's proof while describing a forceful motive for vindictive perjury by DeLutro's principal accuser.

2. The error of variance was compounded by the instructions that the court gave the jury concerning the crime of conspiracy.

The trial court, in instructing the jury on the law applicable to the crime of conspiracy, offered only the most rudimentary guidance on the important issue of the association of the defendant DeLutro with the single encompassing conspiracy alleged. Indeed, as the law was stated for the jury, they were told in effect that if they found that the Government witnesses had agreed with one another to distribute drugs, they might find DeLutro guilty under the conspiracy count if they found that he had implicitly had a similar accord with them in the drug transaction ascribed to him. If not erroneous, the charge was both misleading and insufficient for a fair jury appraisal of a crucial issue in this case. For the evidence required a careful explanation to the jury of the variable circumference of a complex conspiracy, with adequate communication of the possibility that all who deal in drugs with one another may not be parties to the identical conspiratorial agreement.

3. The amorphous crime of conspiracy urgently requires definitive construction by this Court, particularly to preclude the prejudicial and inappropriate employment of a single conspiracy theory in a case such as this one.

Our system is still, despite occasional Governmental lapses, a system of individual justice. A defendant, however reprehensible the accusation, is entitled under this enlightened concept to have the evidence against him weighed and his own conduct judged without contrived association to the illegal activities of others. Particularly where the amorphous device of conspiracy is utilized, courts must zealously guard against the erosion of the blessing of individualized judgment. Not only are the liberties of free people at stake, but the continued and proper place of the law of conspiracy itself is threatened. For in its misuse, thoughtful people are becoming increasingly concerned over palpable intimations of tyranny. Alone among our enumerated crimes, conspiracy exposes the individual to penal consequences by reason of the activities of supposed associates, and without proof of a substantive misdeed. The crime was not intended and should never be employed simply as a means for joining under a single accusation alleged criminals of like stripe. Rather the crime constitutes a basis for early Government intervention when a combination of people, by sharing a specific evil design, threaten future harm. In the interests of preserving this important social instrument of security, the time has come for this Court to move the law into closer congruence with the statute's purpose. Public faith in the law of conspiracy can be restored only by strong judicial disapproval of its malextension. The reversal of DeLutro's conviction, obtained by false joinder in an overly broad and erroneously singular conspiracy, would not only serve justice in his own case, but would provide welcome in-

struction to the Government and assurance to the people that the application of the law of conspiracy will be bounded by its legitimate purpose [see Johnson, *The Unnecessary Crime of Conspiracy*, 61 Cal. L. Rev. 1137 (1973).

Thirty years have passed since this Court decided *United States v. Kotteakos*, 328 U.S. 750 (1946). In that case, moreover, since the error of variance was conceded by the Government, the Court's lenghty opinion was not addressed primarily to that issue. Yet the Court's deep concern with the overextension of conspiracy theory to produce mass trials with their attendant prejudice is evident from the following passage (328 U.S. at p. 773-4):

> There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare

not become careless or complacent when that fashion has become rampant over the earth.

Here toleration went too far. We do not think that either Congress, when it enacted §269, or this Court, when deciding the *Berger* case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the *Berger* situation and for others where proof may not accord with exact specifications in indictments. Otherwise criminal conspirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.

In the light of current prosecution practices, particularly in the otherwise commendable effort to combat the illicit narcotic trade, and recognizing the growing tolerance of Courts of Appeal for the expeditious and efficacious mass trial, the conclusion is inescapable that the important lesson of the *Kotteakos* dictum is fading. The instant case affords the Court an opportunity to revive and reinforce that important principle of individual justice in the prosecution of criminal cases.

4. The prejudicial effect of the error of variance was further agravated by several errors by the trial court and the prosecutor which, in conjunction, denied the petitioner his right to a fair trial.

The trial court further erred in its instructions by an unfair disparity between the treatment of the credibility of the Government witnesses and of the defendant as a witness on his own behalf. While suggesting unmistakably the possibility of truthful testimony, despite significant impediments, on the one hand, the court offered no similar allowance for the defendant, dismissing him with a brisk reminder of his paramount bias.

Despite the fact that the prosecution had in its files evidence which would go far toward discrediting one of its witnesses, while at the same time undermining a principal Government contention to the effect that the witness turned truthful and was assisting the Government in good faith at the time he tendered his accusations against the defendant DeLutro and the others, that material was not turned over to the defendants until after the conclusion of the trial.

At the time of his arrest, well over half a million dollars in currency of small denominations was seized from the home of DeLutro's co-defendant, Lucas. The money was received in evidence against all defendants on the theory that Lucas' possession of it was an act committed during and in furtherance of the conspiracy. The ruling was prejudicially erroneous. That the grand jury had charged that the life of the conspiracy embraced the time at which the money was discovered was of no moment, despite the trial court's express reliance on it. Nor was there a fiber of evidence, however frail, to support the judge's view that the money was connected in some manner with the activities of the conspirators. Rather, the record demonstrates that the charged conspiracy expired with the incarceration of its

three nuclear members and no act was alleged or proved during the eleven months which passed between that terminal event and the seizure of the cash. The conspiracy having been terminated by the enforced cessation of any further activity toward its ends, and the evidence being wholly unconnected with the former project, its possession by Lucas should not have been taken in any way against DeLutro.

CONCLUSION

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 923, 982, 984, 1000—September Term, 1975
Argued: May 5, 1976 Decided: September 7, 1976
Docket Nos. 76-1011, 76-1058, 76-1062, 76-1064

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH MAGNANO, a/k/a "Joe the Grind",
FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose",
RICHARD BOLLELLA,
ANTHONY DE LUTRO, a/k/a "Tony West",
ANTHONY SOLDANO, and FRANK LUCAS,
Defendants-Appellants.

Before:

HAYES AND MULLIGAN,
Circuit Judges,

and PALMIERI,
*District Judge**

Appeal from judgments of the United States District Court for the Southern District of New York convicting appellants, after jury trial before Irving Ben Cooper, *Judge,* of conspiring to traffic in narcotics and possession of narcotics with intent to distribute the same, in violation of 21 U.S.C. §§846, 841(a)(1), and 841(1)(A).

Affirmed.

GRETCHEN WHITE OBERMAN, New York, N.Y., *for Defendants-Appellants Magnano and Pallatta.*

GILBERT EPSTEIN, New York, N.Y. (Stokamer & Epstein, New York, N.Y., on the brief), *for Defendants-Appellant Bollella.*

H. RICHARD UVILLER, New York, N.Y., *for Defendant-Appellant De Lutro.*

ROBERT BLOSSNER, New York, N.Y., *for Defendant-Appellant Soldano.*

JEFFREY C. HOFFMAN, New York, N.Y., (Steven Duke and John L. Pollok, of counsel), *for Defendant—Appellant Lucas.*

DOMINIC F. AMOROSA, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, New York, N.Y., Nathaniel H. Akerman, Federico E. Virella, Jr., Howard S. Sussman, Lawrence B. Pedowitz, and John C. Sabetta, Assistant United States Attorneys of counsel), *for Appellee.*

HAYS, *Circuit Judge:*

Defendants-Appellants, asserting a host of alleged errors below, appeal from judgments of conviction for conspiring to traffic in narcotics and substantive violations of the narcotics laws. Only six of appellants' many arguments warrant discussion in this opinion. We have carefully considered each of the numerous claimed infirmities in their convictions and find none to be meritorious.

The facts adduced at trial evidenced a narcotics conspiracy network not dissimilar, except perhaps in the quantities involved, from many such conspiracies this Court has been called upon to review. The conspiracy, in

broad outline, assumed the customary structure of suppliers, distributors, and retailers. Some members of the conspiracy, depending on their functional level, dealt only with a few other members above or below them while other members transacted business up and down the chain. The evidence at trial, as found by the jury, proved that appellants Pallatta, Magnano, Bollella, De Lutro and Soldano individually and/or collectively sold heroin to the partnership of Ernest Malizia, Mario Perna and Anthony Verzino ("the distributors" or "the core group"). Malizia is a fugitive; Perna and Verzino were unindicted co-conspirators who testified for the Government. Appellant Lucas, a retailer, was the distributor's largest customer and, controlling his own large street level distribution network, purchased in excess of 100 pounds of heroin during the conspiracy.

I. *Single Conspiracy*

As is usual in narcotics conspiracy cases the allegation is here made that although the defendants were indicted and convicted as members of a single conspiracy the proof at trial showed multiple conspiracies. *Kotteakos v. United States*, 328 U.S. 750 (1946). Thus, while Magnano, Bollella and Pallatta jointly supplied the distributors, it is claimed that they formed no part of a conspiracy involving the other two suppliers, De Lutro and Soldano, each of whom also sold narcotics to the distributors. The appellentS claim the existence of at least three distinct conspiracies with each conspiracy defined by the supplier. In support of this claim appellants rely on the distinguishing facts that the distributors bought from De Lutro and from Soldano only once. In contrast, the transactions with the Magnano-Bollella-Pallatta partnership were numerous, generally credit exchanges and for diluted heroin.

We find the multiple conspiracy argument pressed by appellants with their particular emphasis on the single act

doctrine singularly unpersuasive. Precedent within this Circuit abounds for the proposition that one who deals in large quantities of narcotics may be presumed to know that he is a part of a venture which extends beyond his individual participation. *United States v. Ortega-Alvarex*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denies*, 420 U.S. 995 (1975); *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974) *United States v. Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973), *vacated and remanded on other grounds*, 419 U.S. 903 (1974). The nature of the enterprise determines whether this presumption or inference of knowledge of broader scope and participation in a single conspiracy is justified. *United States v. Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). The suppliers in the instant conspiracy, each of whom dealt directly with a member or members of the distribution core group of Perna, Malizia and Verzino, provided that group with approximately 140 pounds of heroin. By virtue of this quantity the vertical nature of the conspiracy was known to the suppliers and customers. As expressed in *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939):

> "[T]he smugglers knew that middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers."

The quantities involved, moreover, permit the inference that the suppliers must have known there was a horizontal

scope to the conspiracy such that others were similarly performing in the supply role. *See United States v. Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975), *cert denied*, _____ U.S. _____ (1976); *United States v. Bynum, supra*, 485 F.2d at 495-497. This *inference* of knowledge, furthermore, is buttressed by evidence that the Magnano-Bollella-Pallatta partnership had *actual* knowledge that the distributors were purchasing from another source with monies owed to the partnership from credit sales to the core group.[1]

For much the same reasons the fact that De Lutro and Soldano each only consummated one transaction with the core group does not render their participation insufficient to warrant their inclusion in the single conspiracy charged. The so-called single transaction rule, *see, e.g., United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971) (*per curiam*); *United States v. Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States v. Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), recognizes that a single isolated act does not, *per se*, support an inference that a defendant had knowledge of, or acquiesced in, a larger conspiratorial scheme. It is only "when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred," *United States v. Agueci, supra*, 310 F.2d at 836, that the single act is an insufficient predicate upon which to link the actor to the overall conspiracy. *See, United States*

1. Appellants' reliance on *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced. In *Bertolotti* the indictment charging a single conspiracy was held to be an improper consolidation of at least four separate and unrelated criminal ventures involving an assortment of "unorthodox and diverse transactions," *id.* at 155, such as to preclude an inference of knowledge. The instant case, in contrast, involves only narcotics transactions and is characterized by the usual structural framework employed by participants in a narcotics distribution scheme.

v. Sperling, 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Reina*, 242 F. 2d 302, 306 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957). Each of the "single acts" here—DeLutro's sale of five kilos pure heroin and Soldano's sale of three kilos—was to core members of the conspiracy and of such a magnitude as to justify "an inference that each knew he was involved in a criminal enterprise of substantial scope." *United States v. DeNoia, supra*, 451 F.2d at 981. *See, United States v. La Vecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1111-12 (2d Cir.), *cert. denied*, _____ U.S. _____ (1975); *United States v. Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974).[2]

II. *Prior Similar Crimes Evidence*

Government witness Verzino was permitted to testify to narcotics dealings he had with appellants Pallatta, Magnano, DeLutro, Bollella and Lucas several years before the conspiracy charged in the indictment commenced.

2. While we reject appellant's protestations of multiple conspiracies, even if we were to find the error of variance to have been committed, we would nevertheless find reversible error absent. As we have often noted, "the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance." *United States v. Agueci, supra*, 310 F.2d at 827. *See United States v. Sir Kue Chin*, _____ F.2d _____, _____ (2d Cir. 1976) slip op. at 3366 and cases cited therein. Each of these appellants were actively engaged in the drug world in a large-scale capacity. None were minor participants joined in trial with top echelon personnel such that proof of the guilt of major violators contaminated the jury's consideration of his guilt individually. *See United States v. Miley, supra*, 513 F.2d at 1209. Nor were the jury's deliberations infected by highly inflammatory testimony about any one of the codefendants which might spill over to the prejudice of others. *Compare United States v. Bertolotti*, 529 F.2d 149, 157-58 (2d Cir. 1975). Essentially the argument of prejudice here is merely a bald assertion that each would have fared better had he been tried alone. As we said in United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971), an appellant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one . . ." *See United States v. Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

Appellants claim admission of this testimony was error. We disagree.

The prior similar crimes testimony was admitted to explain how Verzino, who had been incarcerated from 1966 through August, 1973, was able to become an accepted member of the conspiracy upon his release. Evidence of prior criminal acts is admissible unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value. *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 96 S.Ct. 2169 (1976). Here, as in *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir.), *cert. denied*, 96 S.Ct. 1724 (1976), the Government offered the prior crime evidence for the legitimate purpose of showing the background and development of the conspiracy, and the district judge, properly exercising his discretion, committed no error in allowing its admission.

III. *The Charge to the Jury*

Appellants have compiled an assortment of claimed errors in the trial court's instructions which they argue compel reversal. Reviewing the instructions as a whole, *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973), we find these claims devoid of merit. We here address only the errors claimed in the court's instructions on reasonable doubt.

The remaining objections raised on appeal are either too frivolous to warrant discussion or, because of the failure to object below, have been waived, Fed. R. Crim. P. 30; *United States v. Ingenito*, _____ F.2d _____, _____ (2d Cir. 1976), slip op. at 2689, and are not such as to be saved by the plain error exception. Fed. R. Crim. P. 52(b).[3]

3. We briefly note appellant's claim relating to the court's accomplice testimony instruction. The claim is made that the trial court's instructions on this issue were totally inadequate because they failed to include the cautionary language of *United States v. Padgent*, 432 F.2d 710, 704 (2d Cir. 1970), which

Appellants vigorously argue that the court's failure to instruct the jury, as requested, in the express language of *Holland v. United States*, 348 U.S. 121, 140 (1954) is reversible error. *Holland* defines reasonable doubt as a doubt that would cause a person to hesitate to act in matters of importance in his own life. The judge below instead instructed the jury[4] that reasonable doubt is "an

warns that "[a]n accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony." As we said in *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), however, the *Padgent* language was suggested not for jury instructions but in the context of permitting an expansive scope for cross examination. The district court fully and adequately flagged the pitfalls of accomplice testimony for the jury's attention; the appellants have no serious ground for complaint.

4. The court's definition of reasonable doubt was in full as follows:

> Now, let's go to reasonable doubt. There is no mystery about it. An intelligent high school student can capture its full essence. What does the law mean by reasonable doubt? How much evidence does the government have to place before a jury in any criminal case? Must it be evidence beyond any possible doubt? Absolutely not. The words are reasonable doubt, and they mean that there is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is substantial and not shadowy. A reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.
>
> A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness.
>
> Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start to finish you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives."

This Court has repeatedly expressed the desirability of *Holland's* hesitate to act" language and suggested its use as preferable to alternative phraseologies. *See United States v. Acarino*, 408 F.2d 512, 517 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); *United States v. Hart*, 407 F.2d 1087, 1091 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969); *United States v. Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Nuccio*, 373 F.2d 168, 174-75, (2d Cir.), *cert. denied*, 387 U.S. 906 (1967). In each of these cases, however, we found as we find in the instant appeal, that this difference of nuance does not constitute reversible error. Reading the entire charge it is clearly apparent that the substance of reasonable doubt was fairly conveyed to the jury.

Objection is made to the court's instruction that a

> On the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of a defendant, that you do have an abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives—then you have no reasonable doubt, and in that circumstance it is your sworn obligation to convict.
>
> One final word on this subject of reasonable doubt. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. This is not a mathematical problem. You are dealing with human beings, the flesh, the bone, the tissue. If the rule were you had to be satisfied beyond all possible doubt few men, however, guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. And so, in consequence, the test in a criminal case is that it is sufficient if guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

reasonable doubt is "a doubt founded in reason," and it is "a doubt that is substantial and not shadowy." Such characterization is not erroneous, *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967) and in the context of the entire charge was not misleading. Similarly, appellants objections to that part of the instruction advising the jury that reasonable doubt "is not an excuse to avoid the performance of an unpleasant duty" and that if "the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted," are without merit. *See United States v. Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). While this portion of the charge in isolation may be unduly favorable to the government, *see United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975), *cert. denied*, _____ U.S. _____ (1976), it is not prejudicially erroneous when the charge is considered as a whole and especially when, as here, no objection was made below.

IV. *Admission of Cash into Evidence*

The government introduced into evidence slightly more than one-half million dollars in cash seized, pursuant to search warrant, from appellant Lucas' home on the day of his arrest. Appellants claim this to be prejudicial error arguing that the seizure took place nearly one year after the conspiracy terminated and that there was no connection between the cash and the crime charged. We reject this contention.

At the time the cash was seized drug paraphernalia was also found. These items, both the cash and instruments, were admissible evidence relevant to Lucas' participation in the conspiracy. Moreover, Government witnesses testified that Lucas owed the core group several hundred thousand dollars at the time of his arrest. As we said in *United States v. Tramunti, supra*, 513 F.2d at 1105, "[t]he possession of

large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." That the evidence is obtained by search conducted after the termination of a conspiracy does not preclude admissibility. *United States v. Bermudez, supra*, 526 F.2d at 95. Moreover, we do not find that the introduction of the physical evidence of the cash was so inflammatory or prejudicial to outweigh its probative value as appellants contend.

V. Soldano Identification

Appellant Soldano contends that the court erred in failing to hold a pre-trial evidentiary hearing to determine whether a photographic display in which Verzino identified Soldano was impermissibly suggestive. We need not explore the merits of this contention since, even assuming for purposes of decision that a hearing was warranted, no prejudice is cited by the appellant which would support reversal of his conviction.

The pre-trial photographic identification of Soldano by Verzino was not introduced by the Government at trial. Rather, Verzino made an in-court identification of Soldano after testifying to several face to face meetings he and Soldano had prior to consummating a narcotics transaction. This testimony firmly established an independent basis for the in-court identification. On cross-examination Soldano's counsel had full opportunity to explore the circumstances of the pre-trial identification at which Soldano's picture was one of 32 pictures shown to Verzino. Even on appeal counsel does not seriously argue that the display was impermissibly suggestive or advance any real claim of prejudice suffered therefrom. In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court held "that convictions based on eyewitness identification at trial following a pretrial identification by

photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Appellant's claim clearly does not meet that standard and must fail.

VI. *Brady Disclosure Subsequent to Trial*

Two weeks after trial ended the Government furnished appellants' counsel and the court with three written statements of Mario Perna, a chief Government witness at trial. Appellants immediately moved for a new trial based on newly discovered evidence pursuant to Fed. R. Crim. P. 33. This motion was denied without an evidentiary hearing. In its order the court below found the Government's failure to disclose these statements earlier was inadvertent; that the statements would not have produced a different verdict if available at trial; that the statements were at best cumulative on the issue of credibility and without bearing on the issue of defendants' guilt; and that Perna's testimony was corroborated at trial by other evidence.

We find these findings of the district court fully supported in the record. As such, the court's denial of the motion on the basis of affidavits and without an evidentiary hearing was not error. *See, United States v. Persico,* 339 F. Supp. 1077 (E.D.N.Y.), *aff'd,* 467 F.2d 485 (2d Cir. 1972), *cert. denied,* 410 U.S. 946 (1973). *Cf., United States v. Franzese,* 525 F.2d 27 (2d Cir. 1975).

Affirmed.